Filed 2/5/03 P. v. Echeverra-Romero CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JUAN ECHEVERRA-ROMERO, Defendant and Appellant.	A098027 (San Mateo County Super. Ct. No. SC050821A)

INTRODUCTION

Appellant Juan Echeverra-Romero was charged by information with second degree robbery, assault with a semi-automatic firearm, and making a criminal threat. He moved to dismiss the criminal threat charge for insufficient evidence under Penal Code section 995.[1] After the motion was denied, he pleaded nolo contendere to the robbery and threat charges, and was sentenced in accordance with the terms of a plea agreement. On appeal, he argues that his nolo contendere plea was improperly induced by his misapprehension that he would be able to appeal the denial of his section 995 motion notwithstanding his nolo contendere plea. He also argues that he was denied effective assistance of counsel by his trial counsel's error in advising him that his appeal rights would be preserved.

[1] All further unspecified statutory references are to the Penal Code.

As a factual matter, the record on appeal does not support appellant's contention that his change of plea was induced by a promise, or even by his counsel's plainly erroneous advice, that he could plead nolo contendere and still appeal the denial of his section 995 motion. We therefore affirm the conviction.

FACTUAL AND PROCEDURAL BACKGROUND

The evidence at the preliminary hearing[2] showed that two men, later identified as appellant and a codefendant, Wilfredo Mata, robbed a woman at gunpoint while she was standing at a bus stop. Appellant grabbed the victim from behind, while Mata held a gun to her head and searched her. A man who was riding past the bus stop in a car saw the incident, and made a U-turn to come to the victim's aid. The assailants then ran away, taking with them the victim's purse and gold chain necklace. The witness saw Mata and appellant (whom he recognized as someone he had seen before) jump into a car from the passenger side. The assailants' car drove away, and the witness followed it in his car until he could write down its license plate number. The witness then contacted the police, who had already been called by another bystander, and they broadcast the license number over the police radio.

Within a few minutes after the robbery, the police stopped the car in which appellant and Mata were riding. The witness identified the passengers as the robbers. A search of the car disclosed the victim's purse, containing about $900, as well as a gold chain and a loaded .45-caliber semi-automatic handgun. The woman who was driving the car admitted to the police that appellant and Mata had told her that they planned to commit the robbery.

Appellant was charged by information with three felony counts. The first count charged second degree robbery (§ 212.5, subd. (c)), and pleaded special allegations as to firearm use (§ 12022, subd. (a)(1)), serious felony involving great bodily injury or personal use of a firearm (§ 1192.7, subd. (c)(8)), and committing a felony while on

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[2] Because appellant pleaded nolo contendere, the facts surrounding the crime are taken from the transcript of the preliminary hearing.

probation for a prior felony (§ 1203, subd. (k)), as well as a prior felony conviction for violation of Health and Safety Code section 11350. The second count charged assault with a semi-automatic firearm (§ 245, subd. (b)), again pleading the special allegation as to committing a felony while on probation, and the same prior. The third count charged making a criminal threat (§ 422), again pleading the special allegation of firearm use.

The only issue that was in dispute at the preliminary hearing with regard to appellant was whether there was sufficient evidence to support the charge of making a criminal threat. The officer who interviewed the crime victim testified that the victim reported that one of the assailants (shown by other evidence to have been Mata) had held a gun on her, and that she was scared and thought she would be killed. The officer testified that the victim reported that "they" (meaning the assailants) had told her not to scream, cry, or run, and that "they" had threatened to kill her, though she did not specify how. In response to a question from the court, the officer clarified that the victim had said only one of the assailants had a gun, but the officer did not specify which of the assailants the victim had identified as actually uttering the threatening words.

The judge presiding at the preliminary hearing was initially inclined to hold only Mata to answer on the criminal threat count under section 422.[3] After going back over the officer's testimony about the victim's account of the assault, however, she decided to allow the charge to proceed against appellant as well, because the officer had testified that "they" (i.e., both assailants) had conveyed the threat.

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[3] "Any person who willfully threatens to commit a crime which will result in death or great bodily injury to another person, with the specific intent that the statement, made verbally, in writing, or by means of an electronic communication device, is to be taken as a threat, even if there is no intent of actually carrying it out, which, on its face and under the circumstances in which it is made, is so unequivocal, unconditional, immediate, and specific as to convey to the person threatened, a gravity of purpose and an immediate prospect of execution of the threat, and thereby causes that person reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety, shall be punished by imprisonment in the county jail not to exceed one year, or by imprisonment in the state prison."

Appellant then filed a motion under section 995 to dismiss the criminal threat charge based on lack of evidence that appellant actually made a threat to kill or cause great bodily injury. The motion was denied on the ground that the evidence of the victim's statement that "they" (the assailants) had verbally threatened her was sufficient to withstand a motion to dismiss.

A few days after the denial of his section 995 motion, appellant changed his plea in accordance with a plea agreement. His change of plea form listed no inducements for making the plea other than the terms of the sentence and the dismissal of the remaining portions of the information. Under the agreement, appellant pleaded nolo contendere as to count one, second degree robbery (§ 212.5, subd. (c)), and count three, criminal threat (§ 422). As to count one, he admitted that he was a principal in the offense and was armed with a semi-automatic pistol (§ 12022, subd. (a)(1)). As to each count, he admitted that the offense was a serious felony in which he inflicted serious bodily injury while possessing and using a firearm (§ 1192.7, subd. (c)(8)). Count two (the assault charge) and all the remaining special allegations and priors were dismissed.

At the plea hearing, appellant's trial counsel noted "for the record" that appellant's plea to the criminal threat charge was being entered "pursuant to the provision of" *People v. West* (1970) 3 Cal.3d 595. He explained that appellant was "accepting the plea bargain offer that he cannot afford to turn down given the circumstances, but he's not necessarily admitting to the factual basis" for the offense. After the prosecution presented the factual basis for the plea, appellant's counsel reiterated that he did not stipulate to the factual basis for count three, but only to count one, and reiterated that "Count 3 is under People versus West." Counsel made no reference at any time during the plea hearing to any planned appeal from the denial of the section 995 motion.

In accordance with the terms of the plea agreement, appellant was sentenced to three years in state prison, receiving the lower term of two years on count one, plus an additional consecutive year for the firearm allegation (§ 12022, subd. (a)(1)). On count three, he received the lower term of 16 months (see § 18), which was stayed under section 654.

After appellant was sentenced, his trial counsel filed a notice of appeal. Shortly thereafter, he filed a request for a certificate of probable cause, which contended that the denial of the section 995 motion was appealable despite the nolo contendere plea because appellant had not admitted the factual basis of the allegations, and again cited *People v. West*, *supra*, 3 Cal.3d 595. The request was granted by a different judge than the one who had presided at the plea hearing. The record does not indicate that appellant ever made a motion to withdraw his plea in the trial court.

DISCUSSION

A. Improper Inducement of Nolo Contendere Plea

Notwithstanding the issuance of a certificate of probable cause, appellant's nolo contendere plea clearly bars him from arguing on appeal that the trial court erred in denying his section 995 motion. (*People v. DeVaughn* (1977) 18 Cal.3d 889, 895-896; *People v. Hollins* (1993) 15 Cal.App.4th 567, 574-575; *People v. Truman* (1992) 6 Cal.App.4th 1816, 1820-1821.) Before us, appellant does not claim otherwise. Instead, he contends that he should be permitted to withdraw his nolo contendere plea, and that the plea was constitutionally involuntary, because it was induced by an illusory promise that he could enter the plea while preserving his right to appeal the denial of his section 995 motion as to the criminal threat charge. This argument fails for several independent reasons.

First, there is no evidence in the record that appellant was "promised" by the prosecutor or the trial court that he could appeal after changing his plea. As already noted, neither the change of plea form nor the transcript of the plea hearing contains any indication that any such promise was made, or even mentions the possibility that an appeal would be filed. Moreover, the change of plea form expressly disavows the existence of any inducement for the plea not listed in the document.

Appellant contends that although nothing was expressly put on the record about an appeal of the section 995 order, the prosecutor and the judge understood that appellant had been induced to enter his plea by a promise that he could appeal. The only evidence appellant can point to in support of this contention, however, is his counsel's references

at the plea hearing to *People v. West*, *supra*, 3 Cal.3d 595. This is insufficient. Viewed in context, trial counsel's references to *People v. West* appear to have been intended to mean that appellant was willing to plead nolo contendere, despite his view that the criminal threat count had no factual basis, in order to receive the benefit of the bargained-for sentence. We see no basis in the record for assuming that the judge who accepted the plea, or the prosecutor, interpreted them otherwise.

Appellant also points to the trial court's subsequent grant of a certificate of probable cause as evidence that the plea agreement was understood to be premised on a right to appeal. The certificate of probable cause request was not submitted until after the plea hearing, however, and the order was signed by a different judge. In short, there is no basis in the record for concluding that the judge who presided at the plea hearing understood that the terms of the plea agreement included an unstated promise that appellant would have a right to appeal.

Second, even if there was an implicit understanding of the type appellant describes, we are not persuaded, based on what is contained in the record before us on appeal, that the prospect of appealing the denial of his section 995 motion was a material inducement for appellant to change his plea. As appellant was advised at the plea hearing, if he had gone to trial, he would have risked a maximum sentence of six years in prison on the robbery count alone, given the firearm enhancement.[4] This was a substantial risk, because the evidence against appellant on the robbery charge, including the firearm allegation, was overwhelming. Under the plea agreement, on the other hand, he received a sentence of three years in prison.

Moreover, under the terms of the plea agreement, the sentence on the criminal threat count was stayed under section 654. Thus, even if an appeal on that count had been successful, it would not have resulted in any reduction in appellant's prison term. In

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[4] The upper term for second-degree robbery is five years. (§ 213, subd. (a)(2).) The firearm allegation under section 12022, subdivision (a)(1), would have resulted in an additional consecutive year.

short, on this record, it is sheer speculation to argue that appellant would not have accepted the plea agreement if he had been correctly advised that his plea would forfeit his right to appeal.

Appellant counters that the conviction on the criminal threat count is prejudicial to him, even though his sentence on that count is stayed, because it constitutes a "strike" that may be used against him in future proceedings. We need not consider this contention, because it was raised for the first time in appellant's reply brief. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.)

Even if we were to consider it, however, we would reject it on the merits. Had appellant gone to trial, he faced a strong possibility of being convicted on the assault charge (count two), which also would have constituted an additional "strike." Under the plea agreement, this count was dismissed. Thus, once again, even if appellant did suffer from a misapprehension that he was preserving his appeal rights, we cannot find any factual support in the record on this direct appeal for the proposition that this misapprehension was a material factor in appellant's decision to accept the plea agreement.

B. Ineffective Assistance of Counsel

Appellate counsel urges us to infer from the record that appellant's trial counsel advised appellant that he could plead nolo contendere and still appeal the denial of his section 995 motion. This is a plausible inference, and if such advice was given, it was clearly in error. (See *People v. DeVaughn*, *supra*, 18 Cal.3d at pp. 895-896; *People v. Hollins*, *supra*, 15 Cal.App.4th at pp. 574-575; *People v. Truman*, *supra*, 6 Cal.App.4th at pp. 1820-1821.)

To establish ineffective assistance of counsel, however, a defendant must show not only that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, but also that counsel's deficient performance was prejudicial, i.e., that there is a reasonable probability that, but for counsel's error, the result of the proceeding would have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694; *People v. Scott* (1997) 15 Cal.4th 1188, 1211.) In the context of

a plea bargain, determining whether counsel's error was prejudicial requires us to consider the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer, as well as the probable outcome of any trial, to the extent that may be discerned. (*In re Resendiz* (2001) 25 Cal.4th 230, 253-254.)

In this case, as already noted, the evidence against appellant on the robbery and assault charges was overwhelming, and the plea agreement guaranteed that he would serve significantly less time than the maximum prison term. On this record, therefore, it simply is not reasonably probable that appellant would have chosen to reject the plea agreement and go to trial if he had known he would be giving up his right to appeal. (See *In re Resendiz*, *supra*, 25 Cal.4th at p. 253; *Hill v. Lockhart* (1985) 474 U.S. 52, 59.) Thus, even assuming that trial counsel in fact told appellant he could preserve his appeal rights, and that this error constituted ineffective assistance, we can find no resulting prejudice, and therefore cannot reverse the conviction on that ground.

DISPOSITION

The judgment of conviction is affirmed.

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Ruvolo, J.

We concur:

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Haerle, Acting P.J.

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Lambden, J.